ONG CHIN HAI & ANOR v. ONG HOO SEE & ORS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
MOHD RUZIMA GHAZALI JCA
HASHIM HAMZAH JCA
[CIVIL APPEAL NO: P-02(NCvC)(A)-959-08-2020]
30 JUNE 2022

Abstract – *There is no requirement under the National Land Code ('NLC') for a co-proprietor who wishes to terminate his co-proprietorship on a piece of land to show that he had applied for the land to be partitioned, but the application was rejected, before he can come to court. The co-proprietors ought not to be barred from applying to terminate their co-proprietorship under s. 145(1) of the NLC, which states that 'any of the co-proprietors' may apply for the co-proprietorship in the land to be terminated. The court also has the power to direct a sale instead of partition pursuant to s. 25 and para. 3 of the Schedule to the Courts of Judicature Act 1964 and O. 31 of the Rules of Court 2012.*

LAND LAW: *Ownership – Joint ownership of land – Termination of co-proprietorship – Application for – Whether there was failure to satisfy requirements under s.145(1) of National Land Code – Whether co-proprietor wishing to terminate has to apply for land to be partitioned before coming to court – Whether court has power to direct sale of land pursuant to s. 25 and para. 3 of Schedule to Courts of Judicature Act 1964 – Rules of Court 2012, O. 31 r. 1*

The deceased, the father of all the plaintiffs and the defendants, owned a piece of property ('said property'). In a consent judgment recorded between the parties, the deceased's estate was ordered to be divided equally between the plaintiffs and the defendants. The said property was later registered in the names of the plaintiffs and the defendants as joint owners, each holding 10% undivided shares in the said property. Subsequently, the plaintiffs issued a letter to the defendants notifying their intention to sell the said property. The first and second defendants agreed to sell the property but the third and fourth defendants did not reply. The plaintiffs then filed an application (encl. 1) under ss. 417 and 145 of the National Land Code ('NLC') and under O. 7 and 31 of the Rules of Court 2012 ('ROC') seeking, among others, the following reliefs (i) the plaintiffs' and the defendants' co-proprietorship or joint ownership of the said property to be terminated forthwith; and (ii) the said property was to be sold by way of a public auction at the current market price or at a price which was not less than RM10,500,000. The third and fourth defendants opposed the application. The Judicial Commissioner ('JC')

allowed the plaintiffs' application. Dissatisfied with the said decision, the third and fourth defendants appealed. The third and fourth defendants submitted that the JC had erred both in fact and in law when he failed to consider the plaintiffs' failure to satisfy the requirements under s. 145(1) of the NLC and under O. 31 r. 1 of the ROC.

Held (dismissing appeal with costs)
Per Hashim Hamzah JCA delivering the judgment of the court:

(1) Section 145(1) of the NLC is available to any of the co-proprietors in a jointly owned land who want to terminate their co-proprietorship if any of the co-proprietors will neither join in nor consent to the making of the application for partition of the land or if the application for the partition of the land is incapable of being approved under ss. 136(1)(f) and 141 of the NLC. In such application, the court has the discretion to order the partition of the land or to make any order that the court thinks just to enable the co-proprietorship to be terminated, including to order for the land to be sold. (paras 14 & 15)

(2) The plaintiffs' intention all along was to terminate their co-proprietorship, to have the property be sold by public auction and for the proceeds to be divided equally between the plaintiffs and the defendants. The plaintiffs were not barred from applying to terminate their co-proprietorship under s. 145(1) of the NLC, which states that 'any of the co-proprietors' may apply for the co-proprietorship in the land to be terminated. Therefore, this court did not agree with the third and fourth defendants that the plaintiffs must show that they had requested for the said property to be partitioned and the defendants did not consent to it, before s. 145 of the NLC could be invoked. There was also no requirement under the NLC for the co-proprietor who wished to terminate his co-proprietorship on the land to show that he had applied for the land to be partitioned, but the application was rejected before he could come to court under s. 145 of the NLC. The plaintiffs' application under s. 145 of the NLC was not premature. (paras 20-25)

(3) The court has the power to direct a sale instead of partition pursuant to s. 25 and para. 3 of the Schedule to the Courts of Judicature Act 1964 ('CJA') and O. 31 of the ROC. The court is conferred with additional powers under s. 25 and para. 3 of the CJA in any cause or matter relating to land, to direct the land to be sold instead of partition, if it appears necessary or expedient to do so. By virtue of the broad definition of the term 'cause' or 'matter' under O. 31 r. 1 of the ROC to mean any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding, including every proceeding in court not in a cause, it included the plaintiff's application in the present case. Under the law, there is no express requirement that there must be an existing

or separate cause or matter before the court can exercise its power to order for the land to be sold. There was thus no reason to disturb the findings of the JC. There was no merit in this appeal. (paras 26, 27, 36, 40 & 44)

Case(s) referred to:

Datin Sohaila Adom (Wakil Diri Bagi Adom Hj Ma'adil Simati) v. Einstein Tay [2016] 1 LNS 522 CA ***(refd)***

Hasiah Mat v. Johanariffin Din & Yang Lain [2009] 1 LNS 920 HC ***(refd)***

Koh Heng Jin Holdings Sdn Bhd v. Phuah Beng Chooi & Anor [2016] 3 CLJ 837 CA ***(dist)***

Rubyna Kaur Surinder Singh v. Jasbir Singh Harbajan Singh [2004] 1 CLJ 347 HC ***(refd)***

Tan Kok Chiang v. Tan Yaw Ti & Anor [2009] 1 LNS 711 HC ***(refd)***

Tong Hin Seong & Anor v. Yong Teik Seong [2003] 1 LNS 697 HC ***(refd)***

Young Yean Chin & Ors v. Quek Yak Kang & Ors [2016] 6 CLJ 860 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25, para 3 of Schedule
National Land Code, ss. 136(1)(f), 141, 145(1), 417,
Rules of Court 2012, O. 7, O. 31 r. 1

For the appellants - Lee Ewe Chuan; M/s Lee Law Office
For the respondents - Chan Ai Mei; M/s Phee, Chen & Ung

[Editor's note: Appeal from High Court, Georgetown; Civil Suit No: PA-24NCvC-853-10-2019 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Hamzah JCA:

Introduction

[1] For ease of reference, parties to the present appeal shall be referred to as they were before the High Court.

[2] This is the third and fourth defendants' appeal against the decision of the learned Judicial Commissioner ("JC") on encl. 1, which was delivered on 21 July 2020.

[3] Enclosure 1 is the plaintiffs' application under ss. 417 and 145 of the National Land Code ("NLC") and under O. 7 and 31 of the Rules of Court 2012 ("ROC 2012") seeking, among others, the following reliefs:

(i) the plaintiffs' and the defendants' co-proprietorship or joint ownership over a property known as No. 919, Mk. 13 Relau, 11900 Bayan Lepas, Pulau Pinang erected on Lot No. 1852, Mukim 13, Tempat Relau, Daerah Timor Laut, Negeri Pulau Pinang held under Geran Mukim No. GM 346 ("the said property") to be terminated forthwith;

(ii) the third defendant to vacate the said property within 14 days from the date of the order;

(iii) the said property is to be sold by way of a public auction at the current market price or at a price which is not less than RM10,500,000, which is the market price calculated as of 21 December 2018;

(iv) a licensed auctioneer to be appointed by the court to manage and conduct the public auction;

(v) both parties in the action to be at liberty to appoint an accredited valuer to prepare a valuation report to determine the current market price of the said property together with vacant possession;

(vi) the net proceeds of the sale of the said property after the deduction of all cost, charges and all expenses incurred for the sale, including legal fee, valuer's fee and other related charges and cost in respect of the sale and transfer of the said property be divided equally between the plaintiffs and the defendants calculated based on one-tenth (10%) per person;

(vii) both parties to the action are required to execute and complete any documents required to give effect to the order herein after being given seven days' notice; the Deputy Registrar or the Senior Assistant Registrar of the court be authorised to execute or complete any document and to take all action required to give effect to the order herein; and

(viii) the District and Land Office of Daerah Timor Laut in Pulau Pinang or any relevant authorities to be given full authority to transfer the said property to the name of the purchaser or new owner after receipt of relevant documents to give effect to the order herein.

[4] On 21 July 2020, after hearing both parties, the learned JC allowed the plaintiff's application in encl. 1 with costs of RM6,000, subject to allocator. The third and fourth defendants were dissatisfied with the decision, hence the present appeal.

Brief Facts

[5] Briefly, the facts in the present case are as follows.

[6] The said property previously belonged to one Ong Hooi Hong @ Ong Kim Huat ("the deceased"). The deceased was the father of all the plaintiffs and the defendants.

[7] A consent judgment dated 26 February 2014 was recorded between the parties before the High Court of Malaya in Pulau Pinang in Civil Suit No: 22NCvC-260-08-2013. In the consent judgment, the deceased's estate was ordered to be divided equally between the plaintiffs and the defendants.

[8] The said property was later registered in the names of the plaintiffs and the defendants as joint owners, each holding 10% undivided shares in the said property.

[9] On 22 July 2019, the plaintiffs, through their appointed solicitors, issued a letter to the defendants notifying their intention to sell the said property. By way of letters dated 3 August 2019 and 16 October 2019, the first and second defendants agreed to sell the said property. The third and fourth defendants did not reply.

[10] As of December 2016, the said property was valued at RM10,500,000 based on the valuation report dated 21 December 2016. The land has been valued at RM13,000,000 as of October 2019 based on the updated valuation report dated 22 October 2019.

[11] On 1 October 2019, the plaintiffs filed their application in encl. 1 before the High Court. The third and fourth defendants opposed the application.

Grounds Of The Third And Fourth Defendants' Appeal

[12] As can be gleaned from their memorandum of appeal, the main grounds of the third and fourth defendants' appeal in the present case are as follows namely:

(i) that the learned JC had erred both in fact and in law when he failed to consider the plaintiffs' failure to satisfy the requirements under s. 145(1) of NLC; and

(ii) that the learned JC had erred both in fact and in law when he failed to consider the plaintiffs' failure to satisfy the requirements under O. 31 r. 1 of ROC 2012.

First Issue: Section 145(1) Of NLC

[13] First and foremost, s. 145 of NLC reads:

> Section 145. Power of Court to facilitate termination of co-proprietorship.
>
> (1) Where, **in the case of any land vested in co-proprietors:**
>
> (a) **any of the co-proprietors will neither join in, nor consent to the making of, an application for partition under this Chapter,** or
>
> (b) by reason of the operation **of paragraph (f) of sub-section (1) of section 136** (as applied by section 141), **partition** of the land between all of the co-proprietors is **incapable of being approved** under this Chapter,

A the Court, subject to and in accordance with the provisions of any law for the time being in force relating to civil procedure, may, **on the application of any of the co-proprietors, make such order as it may think just for the purpose of enabling the co-proprietorship to be terminated.**

(2) Without prejudice to the generality of the power conferred by sub-section (1), **the Court may on any application under that sub-section order:**

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(a) that, subject to the making between the co-proprietors of such payments as the Court may consider equitable having regard to the comparative values of the individual portions thereby proposed, any application for partition made by one or more of the co-proprietors in the terms specified in the order shall be deemed for the purposes of this Chapter to have been made by them all;

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(b) that the undivided share of any of the co-proprietors be transferred on the terms specified in the order to the other co-proprietors, or to any of them; or

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(c) **that the land be sold.** (emphasis added)

[14] This provision is available to any of the co-proprietors in a jointly owned land who want to terminate their co-proprietorship if any of the co-proprietors will neither join in nor consent to the making of the application for partition of the land or if the application for the partition of the land is incapable of being approved under ss. 136(1)(f) and 141 of NLC.

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[15] In such application, the court has the discretion to order the partition of the land or to make any order that the court thinks just to enable the co-proprietorship to be terminated, including to order for the land to be sold. See *Young Yean Chin & Ors v. Quek Yak Kang & Ors* [2016] 6 CLJ 860 (CA).

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[16] Learned counsel for the third and fourth defendants submitted that the plaintiffs' application in encl. 1 was premature since the plaintiffs failed to satisfy the requirements under s. 145(1) of NLC. According to the third and fourth defendants, the plaintiffs in their application failed to show that (i) there was any request from the plaintiffs to the defendants to apply for the said property to be partitioned, (ii) the third and fourth defendants did not consent to the making of an application for the said property to be partitioned, and (iii) the plaintiffs had applied for the said property to be partitioned but the application was denied.

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[17] Learned counsel for the third and fourth defendants relied on the case of *Koh Heng Jin Holdings Sdn Bhd v. Phuah Beng Chooi & Anor* [2016] 3 CLJ 837; [2016] MLJU 1718; [2016] 2 MLRA 324, where Alizatul Khair Osman JCA (as Her Ladyship then was) in speaking for the Court of Appeal, held:

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> [25] On this issue, it was the defendants' submission that as *the power of the court to terminate the co-proprietorship under s. 145 of the NLC only arises if any of the co-proprietors refuses to join in or to consent to an application for partition. No such issue arises here as the plaintiff had never requested the defendants to consent to the partitioning of the property.* The plaintiff did not adduce any evidence by way of correspondence between the parties or of any meeting or discussion to prove that such request for partition was made to the defendants.
>
> [26] We agreed with the submission of learned counsel for the defendants that the plaintiff's reliance on s. 145 of the NLC to terminate the co-proprietorship is misconceived as firstly, *there is no evidence of any request by the plaintiff to the defendants for the said property to be partitioned let alone evidence of any refusal by the defendants to consent to the partition.* (emphasis added)

[18] However, we agree with learned counsel for the plaintiffs that the facts in *Koh Heng Jin*'s case can be distinguished from the facts in the present case.

[19] In *Koh Heng Jin*'s case, the dispute between the parties arose from the administrator's refusal to accept the plaintiff's proposal for the creation of tenancy and the imposition of rental. The court in *Koh Heng Jin*'s case also found that the real issue, as can be gleaned from the exchange of letters between the parties, was the rental issue (see paras. 32 to 33 of the judgment). There was nothing in the evidence to suggest either party's refusal to partition the land.

[20] On the other hand, we found that the plaintiffs in the present case were the ones who had no intention to apply for the said property to be partitioned. It is clear from the evidence that the plaintiffs' intention all along was to terminate the co-proprietorship, to have the property be sold by public auction and for the proceeds to be divided equally between the plaintiffs and the defendants.

[21] We are of the considered view that the plaintiffs were not barred from applying to terminate their co-proprietorship under s. 145(1) of the NLC which states that "any of the co-proprietors" may apply for the co-proprietorship in the land to be terminated. Therefore, we do not agree with the third and fourth defendants that the plaintiffs must show that they had requested for the said property to be partitioned and the defendants did not consent to it, before s. 145 of NLC could be invoked.

[22] There was also no requirement under NLC for the co-proprietor who wished to terminate his co-proprietorship on the land to show that he had applied for the land to be partitioned, but the application was rejected before he could come to court under s. 145 of NLC.

[23] We refer to the case of *Datin Sohaila Adom (Wakil Diri Bagi Adom Hj Ma'adil Simati) v. Einstein Tay* [2016] 1 LNS 522 (CA), in which Zaharah Ibrahim JCA (as Her Ladyship then was) in delivering the judgment of the Court of Appeal held as follows:

A [35] Section 141A as introduced into the NLC, and which became the subject of the difference of views in the High Court cases referred to above, allowed a co-proprietor or co-proprietors holding the major share in the land to apply to partition the land, notwithstanding the requirement in section 141 of the NLC. That application would still be subject to the provisions of section 142, particularly subsections (3) and (4) of section
B 142, of the NLC.

[36] *It must be noted that no consequential amendment was made to section 145 of the NLC. In other words, Parliament saw it fit to retain the existing avenue for co-proprietors, including one holding a major share in the land held under such co-proprietorship, to apply to the High Court for termination of such*
C *co-proprietorship.*

[37] We therefore agree with the view of the learned High Court Judge in the case of *Ku Yan bte Ku Abdullah*:

(a) that section 141A did not compel a co-proprietor holding the major share in a piece of land to apply to the land administrator
D for approval to partition the land;

(b) that section 141A was merely a permissive section; and

(c) that a co-proprietor having the major share in a piece of land is not barred from applying to the High Court under subsection 145(1) to have the co-proprietorship terminated and the land
E partitioned on the general ground that a co-proprietor will not join in nor consent to the making of an application for partition.

[38] Section 141A of the NLC was further amended in 2008 by the National Land Code (Amendment) Act 2008 (which came into force in Johor on 011/01/12009).

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[39] After the 2008 amendment to section 141A, any co-proprietor may apply to the State Director or the Land Administrator for partition of the land if "other co-proprietors neither join in nor consent to the making of the application".

[40] Even though the amended section 141A contains a similar condition
G as the condition in paragraph 145(1)(a) (namely, the absence of participation or consent by any of the co-proprietors) for the making of an application for partition or termination of co-proprietorship, no amendment was made to section 145 by Parliament.

[41] It must also be borne in mind that the National Land Code
H (Amendment) Act 2008 also amended section 141 as well as sections 142 and 143A to enable agricultural land to be subdivided even though it is Jess than 215 of a hectare in area. Yet paragraph 145(1)(b) of the NLC was left untouched. A court order under paragraph 145(1)(b) was previously the only way a co-proprietor could have agricultural land involving or resulting in areas of less than 215 of a hectare partitioned.

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[42] *In our view, with the amendment to section 141A a co-proprietor, even a co-proprietor holding a minor share in land held under co-proprietorship, has an option of either applying under section 141A or under 145 of the NLC for approval to partition the land held under such co-proprietorship.*

> [43] In our considered opinion, the view of the learned High Court Judge in the case of *Ku Yan bte Ku Abdullah* holds true also (by virtue of the amended section 141 A), for a person holding a minor share in the land. *In other words, there is no requirement under the NLC that a co-proprietor must first make an application under sections 141A and 142 of the NLC before he can make an application under section 145 of the NLC.* (emphasis added)

[24] In addition, we agree with Su Geok Yiam J in *Hasiah Mat v. Johanariffin Din & Yang Lain* [2009] 1 LNS 920 (HC), who took a similar view and held as follows:

> Dalam prosiding ini *adalah jelas bahawa plaintif tidak ingin untuk memohon untuk pemecahan sempadan tanah tersebut kerana plaintif memerlukan wang hasil daripada penjualan 1/2 bahagian yang tidak dibahagikannya* dalam tanah tersebut bagi tujuan membayar kos rawatan anaknya yang mengalami penyakit barah. Ini bermakna, *plaintif sudah mematuhi salah satu daripada dua syarat yang diperuntukkan di bawah s. 145(1) KTN. Itu sudah memadai untuk mahkamah menggunakan budi bicara* yang diberikan kepada mahkamah di bawah s. 145(2)(c) KTN untuk memerintahkan *supaya tanah tersebut dijual.* (emphasis added)

[25] In a nutshell, we do not agree with the third and fourth defendants that the plaintiffs' application under s. 145 of NLC was premature.

Second Issue: Section 25 And Para. 3 Of The Schedule To Courts Of Judicature Act 1964 ("CJA 1964") And O. 31 Of ROC 2012

[26] Even if the requirements under s. 145(1) of the NLC have not been complied with, the court still has the power to direct a sale instead of partition pursuant to s. 25 and para. 3 of the Schedule to CJA 1964 and O. 31 of ROC 2012. See *Koh Heng Jin* (*supra*).

[27] The court is conferred with additional powers under s. 25 and para. 3 of the Schedule to CJA 1964 in any cause or matter relating to land, to direct the land to be sold instead of partition, if it appears necessary or expedient to do so. The relevant provision reads:

> Section 25. Powers of the High Court.
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> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
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> (2) Without prejudice to the generality of subsection (1) **the High Court shall have the additional powers set out in the Schedule:**
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> Provided that all such powers **shall be exercised in accordance with any written law or rules of court relating to the same.**

SCHEDULE

3. Partition of land

Power to direct a sale instead of partition in any action for partition of land; and **in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold,** and to give ail necessary and consequential directions. (emphasis added)

[28] The relevant rules of court pertaining to the above can be seen in O. 31 r. 1 of the ROC 2012 which states:

Power to order sale of immovable property (O. 31, r. 1)

1. Where **in any cause or matter relating to any immovable property** it appears **necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold,** the **Court may order that property or part to be sold,** and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

(emphasis added)

[29] On this issue, learned counsel for the third and fourth defendants submitted that the learned JC erred when he failed to consider that the plaintiffs had failed to show that the provisions under O. 31 r. 1 of the ROC 2012 had been complied with.

[30] Firstly, according to learned counsel for the third and fourth defendants, the plaintiffs failed to show the existence of any "cause" or "matter" relating to the said property.

[31] Learned counsel for the third and fourth defendants submitted that the term "cause" and "matter" under O. 31 r. 1 of the ROC 2012 refers to a separate cause or matter other than the plaintiffs' application in encl. 1.

[32] In support of their submission, the third and fourth defendants primarily relied on the case of *Rubyna Kaur Surinder Singh v. Jasbir Singh Harbajan Singh* [2004] 1 CLJ 347; [2003] 6 MLJ 753 (HC).

[33] In *Rubyna Kaur*'s case, the applicant filed an originating summons for an order for the sale of a piece of land registered under the applicant's and the respondent's name. Suriyadi Halim Omar J (as His Lordship then was) opined that there must be some existing court proceedings relating to the impugned property within the context of O. 31 to satisfy the requirement for a "cause" or a "matter" under the CJA 1964. In his exact words:

I now touch on question (ii). As O. 31 speaks succinctly of the existence of the precondition of cause or matter, and unless that precondition is established first, any application would face certain rejection at the outset What then is cause or matter in the context of this Order? Under s. 3 of

the Courts of Judicature Act 1964, the interpretation of *cause includes "any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding," whilst matter would include "every proceeding in court not in a cause."* *Black's Law Dictionary* defines cause as "a suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice." As regards matter Black defines it as "substantial facts forming basis of claim or defence; facts material to issue; substance as distinguished from form; transaction, event, occurrence, subject-matter of controversy." Despite the wide scope of the words cause and matter or because of it, as defined by the CJA and Black (as the terminology includes is adverted to), *I was satisfied that these two words must relate to some existing court proceedings pertaining to the impugned property within the context of O. 31.* Without mincing words, *prima faci*e if there are no court proceedings, not necessarily confined to actions filed by the contending parties, then justification of necessity or expediency of that intended sale does not exist. From the evidence, and also admitted by both parties, I had managed to gather that there was no cause or matter in relation to the impugned property having been filed in court in whatever form *eg*, a separation or even divorce proceedings by the contending parties or any litigation taken up even by an interested third patty anywhere in Malaysia. On that score, bearing in mind that the additional powers "shall be exercised in accordance with any written law or rules of court," and as the applicant had failed miserably as regards a pertinent requirement, she already at the opening stage was hard pressed to convince me. To avoid any uncertainty, I must unhesitatingly state that as I had found no cause or matter at the stage of the application, to grant the application would mean exercising the powers of sale in contravention of any written law or rules of court relating thereto. (emphasis added)

[34] On this issue, the learned JC found that:

[25] In any event, even if, encl. 1 is a separate and distinct cause of action from Suit 260, by virtue of the meaning ascribed to "cause" and "matter" in CJA 1963, this Originating Summons (encl. 1) is an original proceeding in a cause or matter relating to an immovable property.

[26] The interpretations of "cause" and "matter" under s. 3 of the Courts of Judicature Act 1963 ("CJA 1963"), are,

"cause" includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding;

"matter" includes every proceeding in court not in a cause;

[27] Therefore, encl. 1 is in compliance with the said pre-condition and is within the ambit of O. 31 r. 1, ROC 2012 and I find the third and fourth defendants' preliminary objection that there is no cause or matter relating to the said property is without merit.

[35] We agree with the learned JC. We also agree with Rhodzariah Bujang JC (as Her Ladyship then was) in *Tan Kok Chiang v. Tan Yaw Ti & Anor* [2009] 1 LNS 711 (HC) who took a different view than His Lordship Suriyadi Halim Omar J. Her Ladyship opined that there is no necessity for there to be an existing court proceeding other than the action filed by the plaintiff for the court to exercise power to order the sale of the land. It was held in the following words:

> I am compelled to state the obvious, which is the power to order sale of the land under Item 3 is an additional one conferred to the High Court, the main powers being that provided by s. 25 of the CJA which are those vested in the High Court immediately prior to Malaysia Day and such other powers as can be found in any written law.
>
> When the written law is silent on the power of the High Court, then it is right that we look into the additional powers conferred by the Schedule to the CJA and as I said earlier it is only the exercise of these powers which must follow any written law or rules of court. Clearly, therefore, O. 31 of the RHC 1980 regulates the exercise of the power of sale conferred by item 3 of the Schedule.
>
> As for the above-mentioned proviso to s. 25(2), my interpretation of it is that the exercise of the power to order sale of the land must be done according to any written law or rules of court; not that the power to do so must be provided by written law. I agree with James Foong J (as His Lordship then was) in *KK Kumaran v. TS Sambanthamurthi* [1997] 2 CLJ 26; [1996] 3 MLJ 309 that O. 31 r. 1 of the Rules of the High Court 1980 is the relevant Rules governing the exercise of the power conferred by the said item 3 and it says (as did item 3) that I could order such a sale if it "... appears necessary or expedient ...".
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> In arriving at this decision I respectfully declined to follow the decision of Suriyadi Halim Omar J's decision (as His Lordship then was) in *Rubyna Kaur Surinder Singh v. Jasbir Singh Harbajan Singh* [2004] 1 CLJ 347 cited by Ms. Stephanie Chin and find support in the decision of Abdul Malik J (as His Lordship then was) in *Vong Hin Seong & Anor v. Yong Teik Seong* [2003] 1 LNS 697; [2003] 6 MLJ 38 the facts of which case is not unlike the present one before me. In that case two brothers also could not agree on the amount of rentals which one must to pay to the other. Abdul Malik J decided that an order for sale of the land should be made to resolve the impasse between the parties. His Lordship held that he has the power to order the sale based on the provisions of law I quoted earlier and not on any provision of the National Land Code.
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> With respect to the decision in *Rubyna*'s case (*supra*) *I do not think there is a necessity for there to be an existing court proceedings other than the action filed by the plaintiff in order for the court to exercise the power to order the sale.*
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> (emphasis added)

[36] In our view, by virtue of the broad definition of the term "cause" or "matter" to mean any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding, including every proceeding in court not in a cause, which in our view, includes the plaintiff's application in the present case. Under the law, there is no express requirement that there must be an existing or separate cause or matter before the court can exercise its power to order for the land to be sold. Based on the facts in the present case, we agree with the position taken by the court in *Tan Kok Chiang* rather than in *Rubyna Kaur*.

[37] Secondly, learned counsel for the third and fourth defendants submitted that the plaintiffs failed to show that it appears necessary or expedient that the property should be sold.

[38] On this issue, the learned JC found:

> [33] In this matter; the **plaintiffs and the defendants have equal shares** in the said Property. However, it is **only the 3rd defendant who is enjoying the use and benefit of said Property. Aside from paying the utility bills** in respect of the said Property, the **3rd defendant is not paying any rental for the use and enjoyment of the said Property which is jointly owned in equal shares by all the plaintiffs and defendants.**
>
> [34] Yet, in all the affidavits filed by the 3rd and 4th defendants, **they have failed to show any legally acceptable justification for the 3rd defendant to remain on the said Property** and continue to enjoy the benefits of the same without having to pay rent, **much to the detriment of the plaintiffs and the 1st and 2nd defendants.**
>
> [35] Hence, due to the 3rd and 4th defendants' stance, **there is a stalemate between the parties** who are siblings and children of the deceased, as to how the said Property is to be dealt with.
>
> [36] Consequently, from the averment of the parties in the affidavits filed therein, I am satisfied **that the sale of the said Property has become necessary and expedient to resolve the deadlock.** As held by Abdul Malik Ishak J in *Yong Hin Zeong* (*supra*), "the practical way and the only way to resolve the impasse between the plaintiffs and the defendants was to sell the property by way of a court order and that the sale be effected by public auction." (emphasis added)

[39] In so finding, the learned JC relied on the case of *Tong Hin Seong & Anor v. Yong Teik Seong* [2003] 1 LNS 697; [2003] 6 MLJ 38 (HC), where Abdul Malik Ishak J (as His Lordship then was) held as follows:

> The family arrangement between the three brothers wherein the defendant stayed at the property by paying the rental at the rate of RM330 per month between 1975 and 1995 was good as it lasted. After 1995, trouble started to brew when the rental was increased and **the defendant refused to pay the rental and also refused to leave the property.** This culminated in the filing of the claim by the plaintiffs in the magistrate's court.

> The defendant cannot be allowed to remain on the property and not paying the rent and refusing to vacate the property. Equitable principles must be brought into the picture. Principles of equity are certainly wide and elastic and they can apply to new circumstances that may arise from time to time. The plaintiffs had not taken the law into their own hands. They sought legal redress before the magistrate's court. Now, they are seeking this court to adjudicate on their application in end 1. The maxim that he who seeks equity must do equity has been complied with by the plaintiffs ...
>
> ... **The practical way and the only way to resolve the impasse between the plaintiffs and the defendant would be to sell the property by way of a court order** and that the sale be effected by public auction. This was done in the case of *KK Kumaran v. TS Sambanthamurthi* [1996] 3 MLJ 309. It was also done in the case of *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169. And it will be done in this case.
>
> (emphasis added)

[40] We see no reason to disturb the findings of the learned JC.

[41] According to learned counsel for the third and fourth defendants, the learned JC had failed to take into consideration the prejudicial effect of allowing encl. 1 against the defendants. However, we found that the learned JC had already considered the issue as can be seen below:

> [16] The other reasons advanced by the 3rd and 4th defendants to oppose Enclosure 1, are the prejudicial effects especially to the 3rd defendant, as follows:
>
> i. the 3rd defendant and his family have been residing in the said Property for around 30 years and to date continue to live there;
>
> ii. the 3rd defendant has paid and continues to pay all the utility bills in respect of the said Property;
>
> iii. the said Property was used by the deceased to operate a vehicle repair business and in 2002 utilising the name of the deceased, the said business was registered as Pool Hong Motor Services ("HHMS") in the names of the 4th plaintiff and the 3rd defendant;
>
> iv. the establishment of HHMS was to ensure continuity of the deceased's efforts after his demise;
>
> v. HHMS is the main source of income for the 3rd defendant, which is used for his subsistence and to support his wife, who is unemployed and his 2 school going children;
>
> vi. HHMS is also the main source of income of the 4th plaintiff; and
>
> vii. there is much sentimental value attached to the said Property as the 1st, 2nd, 3rd, and 6th plaintiffs and the 1st, 2nd and 3rd defendants were born there and the same will be lost forever if this application is allowed.

[42] Learned counsel for the third and fourth defendants also submitted that the plaintiffs' application was tainted with bad faith, but we found the allegation unfounded.

[43] For the reasons enumerated above, we found that there was no merit in the third and fourth defendants' appeal.

Conclusion

[44] In conclusion, after perusing the appeal records and after hearing the submission of both parties, we found no merit in this appeal. Our decision is unanimous. The appeal is dismissed with costs of RM5,000 subject to allocator. The decision of the High Court is hereby affirmed.